Supreme Court, U.S.
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No. 90-1330

In The

Supreme Court of the United States

October Term, 1990

PARKER DRILLING COMPANY,

Petitioner,

v.

BOWEN SANDERS, BARBARA SANDERS, GEORGE HOWARD, RHODNEY CANTU, and JOLINE CANTU,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

LEE HOLEN
LAW OFFICES OF LEE HOLEN
437 E Street, Suite 400
Anchorage, Alaska 99501
(907) 278-0298
Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the Ninth Circuit err in its analysis of state law, and did that error lead it to disregard Federal Rule of Civil Procedure 51 and the Seventh Amendment?

2. Where the question of the Ninth Circuit's deference to the district court's evaluation of Alaska law was never raised on appeal, and in *Salve Regina College v. Russell*, this Court recently affirmed the Ninth Circuit's approach of *de novo* review of a district court's legal analysis, should the judgment be vacated to permit the appeals court to affirm based on some other standard of review?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

Facts 1

Litigation Below 3

REASONS FOR DENYING THE WRIT 4

1. This State Law Diversity Case Meets None Of The Appropriate Considerations Governing Review On Writ Of Certiorari 4

2. The Ninth Circuit Court Of Appeals Applied The Same Legal Standard As Did The Trial Court's Instruction To The Jury; Therefore, Parker Drilling Company Was Not Denied Its Seventh Amendment Right To A Jury Trial And The Ninth Circuit Did Not Violate Federal Rule Of Civil Procedure 51 6

3. The Question Of The Ninth Circuit's Deference To The District Court's Evaluation Of Alaska Law Was Never Raised On Appeal; Even If It Were, This Court Approved The Ninth Circuit's *de novo* Standard Of Review In *Salve Regina College v. Russell* 10

CONCLUSION 11

APPENDIX

APPENDIX A Jury Instruction No. 7 ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Boyer v. United Technologies Corp., 487 U.S. 500 (1988) 9

Ewers v. Stroh Brewery Co., 443 N.W.2d 504 (Mich. App. 1989) 8

Jones v. Central Peninsula General Hospital, et al., 779 P.2d 783 (Alaska 1989) 8, 9, 10

Pugh v. See's Candies, Inc., 203 Cal. App. 3d 743, 250 Cal. Rptr. 195 (1988) 8

Salve Regina College v. Russell, 59 USLW 4219 (1991) (No. 89-1629; March 20, 1991) 10

Sanders v. Parker Drilling Co., 911 F.2d 191 (9th Cir. 1990) 2, 3, 4, 5, 8, 9

Singleton v. Wolff, 428 U.S. 106 (1976) 9

Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) 7, 8, 9

Zoerb v. Chugach Electric Association, 798 P.2d 1258 (Alaska 1990) 7, 8, 9, 10

STATUTES & OTHER AUTHORITY

Federal Rules of Civil Procedure, Rule 5.1 ..... 6, 7

U.S. Constitution Amendment VII 6, 7

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STATEMENT OF THE CASE

Facts. Respondents Bowen Sanders, Rhodney Cantu, and George Howard all worked as floorhands on Petitioner Parker Drilling Company's Rig 191 on Alaska's North Slope, until they were suspended and ultimately discharged in early 1983 for violating Parker's ban on the use of drugs. Respondents sued Parker Drilling Company

for wrongful discharge in breach of their just cause contracts and the covenant of good faith and fair dealing.

At trial, Parker presented a very weak case; its termination decision was based entirely on circumstantial evidence without any persuasive evidence that respondents had in fact smoked marijuana. *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 200-201 n.11 (9th Cir. 1990) (Petitioner's App. A at 18a-20a). Respondents submitted ample evidence from which the jury could have concluded the employer acted in bad faith and did not have just cause to discharge the respondents.[1]

For example, the petitioner violated its usual and customary procedure regarding the discharge of employees for use or possession of alcohol or marijuana on the job or in camp. In all other similar instances where Parker employees were accused or suspected of drug or alcohol use, and where specific proof of the violation did not exist, either the employees were not fired or they were later reinstated.

In addition, the petitioner failed to provide the respondents with the specifics of the charges against them, contrary to company rules and actual practice. Parker management also threatened to "blackball" the respondents from future work on the North Slope if they did not agree to termination. 911 F.2d at 195. (Petitioner's App. A at 8a.)

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[1] The respondents' version of the facts, unlike the petitioner's, is drawn from portions of the record obviously credited by the jury.

In its investigation, the company ignored credible evidence that the employees did not smoke marijuana. Tom Manix and Gerald Borthwick, both Parker employees who worked on Rig 191 with respondents, testified they had never seen respondents smoke; Manix testified he had been specifically instructed to keep an eye on them and would have known had they engaged in prohibited conduct. 911 F.2d at 195. (Petitioner's App. A at 8a.)

Further, the charges against respondents were over six months old, were based on hearsay, lacked first hand knowledge, and were otherwise unreliable. Malcolm Calhoun, another Parker employee, testified it would have been impossible for respondents to have smoked on the rig without detection. *Id.* Calhoun was actually living and working in the mud shack where one of the respondents' accusers surmised they had smoked. Calhoun testified he never saw respondents smoke, nor did he smell the presence of marijuana in the shack. 911 F.2d at 200 n.11. (Petitioner's App. A at 19a.)

Finally, the employees who testified on behalf of the petitioner and against the respondents were not credible witnesses; in particular, Parker's main witness against the respondents gave inconsistent statements and was financially motivated to testify. 911 F.2d at 201 n.11.

Litigation Below. The petitioner's summary of the litigation below mischaracterizes two important points which distort its discussion of the appeal to the Ninth Circuit. First, the petitioner never agreed with the district court's instruction on just cause as implied in its petition. At trial, petitioner objected to Instruction 7 on just cause

and argued before both the district and appellate courts that it was error to require the employer to prove it had just cause for discharge. (Instruction 7, CR 94a, attached hereto in full as Appendix A.) Now petitioner argues that the trial court's instruction *was* correct, and that the Ninth Circuit Court of Appeals erred by not deferring to the trial court.

Second, the entire thrust of the petitioner's argument to this Court is premised on its contention that the jury instruction on just cause was intended by the trial court to be a *subjective* standard, which the Ninth Circuit Court then changed to an *objective* standard. However, as respondents will show below, both the trial court and the appellate court correctly applied an objective standard of just cause, consistent with Alaska state wrongful discharge law.

REASONS FOR DENYING THE WRIT

1. This State Law Diversity Case Meets None Of The Appropriate Considerations Governing Review On Writ of Certiorari.

There were no important or conflicting questions of federal law raised in this case before the district court or on appeal before the Ninth Circuit. *Sanders v. Parker Drilling Co., supra,* is a common law wrongful discharge action which was originally filed in Alaska state court; it was removed by the petitioner to the federal district court on the basis of diversity jurisdiction since respondents are Alaska citizens and Parker Drilling Company is an Oklahoma corporation. Having removed the case in order

to take advantage of a federal forum for the application of state law, petitioner now searches in vain for some federal law basis on which to draw this Court into deciding what Alaska's law of unjust discharge is or should be.

The case was tried to a jury in September of 1987 on three issues, all arising solely under Alaska state common law.[2] The case raises no constitutional questions, requires no accommodation of state and federal interests, there were no conflicts between federal or state statutes and no preemption questions; it is simply an Alaska state law case which resulted in a jury verdict with which the petitioner disagrees.

The petition, while couched ostensibly in terms of legal disputes, ultimately reargues and turns on the same factual dispute contested at trial, in post-trial motions, on appeal, and in rehearing petitions in the Ninth Circuit, *i.e.*, did Parker prove it had just cause to discharge the respondents? Both the district court and the Ninth Circuit determined there was substantial evidence to support the verdict, and this Court should not grant review on such a fact-specific question. The dispute has already absorbed more appellate energy than is justified and is federally unimportant.

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[2] (1) Did the Plaintiffs' contract of employment include an implied term that they could be discharged only for just cause; (2) if so, did Parker Drilling Company have just cause; and (3) did Parker Drilling Company breach the covenant of good faith and fair dealing by discharging the Plaintiffs? All issues were decided in Plaintiff's favor. Issue one was not appealed; issue two was affirmed by the Ninth Circuit Court of Appeals, which therefore found no need to discuss the third issue. 911 F.2d at 192 n.1. (Petitioner's App. A at 2a.)

2. The Ninth Circuit Court Of Appeals Applied The Same Legal Standard As Did The Trial Court's Instruction To The Jury; Therefore, Parker Drilling Company Was Not Denied Its Seventh Amendment Right To A Jury Trial And The Ninth Circuit Did Not Violate Federal Rule of Civil Procedure 51.

Petitioner's first two reasons for granting the writ argue that the Ninth Circuit Court of Appeals changed the issue in this case from the one that was tried, applied the facts to that new issue, and then speculated about what the jury decided, thereby depriving the petitioner of a right to a jury trial and violating Fed. R. Civ. P. 51. (Petition for Writ at 8-12 [first reason] and 13-16 [second reason].) Both of these reasons for granting the writ turn on its contention that the district court's intended legal standard for determining just cause was changed by the court of appeals from a *subjective* standard to an *objective* standard.

Contrary to petitioner's assertion, however, the Ninth Circuit focused on the exact same issue as did the district court in jury Instruction 7: did Parker Drilling prove it had just cause to terminate, *i.e.*, did the employees engage in the conduct alleged? 911 F.2d at 194. (Petitioner's Appendix A at A4-5.) The district court and the Ninth Circuit were in agreement on the just cause instruction and the objective standard, contrary to petitioner's arguments. (App. A – Jury Instruction 7.)[3]

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[3] It is true, as petitioner points out, that the district court rejected respondents' initial proposed jury instruction on the

(Continued on following page)

In effect, then, the first two questions are not truly ones of federal law. The Ninth Circuit did not think that it was deciding any questions concerning the Seventh Amendment or under Rule 51, nor did it apply some novel rule that warrants consideration by this Court; indeed, neither the Seventh Amendment nor Rule 51 is even mentioned in the majority opinion. It is true that the dissent, like the petition, accuses the majority opinion of having the effect of "disregard[ing]" Rule 51, in light of the disagreement the dissent expresses with the majority's view of state law. But that simply reemphasizes that the petition is driven by state law concerns, not by questions of federal law, and a grant of certiorari would simply have the effect of engaging this Court in an effort to decide what law the Alaska Supreme Court would apply here.

On the question of applicable state law, petitioner contends the Ninth Circuit was incorrect in assuming that the Alaska Supreme Court would follow *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980). The petition also implies that the district court did not follow *Toussaint*. (Petition for Writ at 10-11, 16.) Assuming that this Court has any interest in these questions of state law on which the petition turns, neither argument has merit.

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just cause issue. (Petition for Writ at 6.) Instead, it used a more general objective standard of just cause, precisely the language which has since been approved by the Alaska Supreme Court in *Zoerb v. Chugach Electric Association*, 798 P.2d 1258, 1263 (Alaska 1990).

First, in *Jones v. Central Peninsula General Hospital, et al.*, 779 P.2d 783 (Alaska 1989), the Alaska Supreme Court cited *Toussaint* and specifically approved the objective just cause standard.[4] Shortly thereafter, the Alaska court confirmed the jury's right to review the employer's defenses as to the facts and the employer's motivation. *Zoerb v. Chugach Electric Association*, 798 P.2d 1258, 1263 (Alaska 1990), citing *Ewers v. Stroh Brewery Co.*, 443 N.W.2d 504, 507 (Mich. App. 1989). Second, petitioner's argument that the district court rejected the *Toussaint* objective standard and instead approved a subjective just cause standard following *Pugh v. See's Candies, Inc.*, 203 Cal. App. 3d 743, 250 Cal. Rptr. 195 (1988), is clearly erroneous.[5] The district court specifically cited *Toussaint* in denying petitioner's summary judgment post-trial motions. (Petitioner's App. B at 63A, 68A n.1.)

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[4] The question of whether Jones was discharged for good cause, or whether she "was really discharged for another reason . . . is one . . . for the [trier of fact]." *Jones*, 779 P.2d 783, 787, citing *Toussaint*, 292 N.W.2d at 896.

[5] Contrary to the petitioner's assertion that *Pugh* and *Toussaint* somehow conflict, the *Pugh* court noted that the reasoning of *Toussaint* supported its decision. 250 Cal. Rptr. at 212. And *Pugh* involved a different question than the one presented in the instant case: there, the employee was discharged because of the employer's subjective dissatisfaction with the employee's performance. The *Pugh* court specifically distinguished that question from the type presented in *Sanders*, *i.e.*, where the employer claims the employee was discharged for specific misconduct and the employee claims he did not commit it. The *Pugh* court approved the *Toussaint* holding that the latter question, the issue in *Sanders*, is an objective one for the jury. 250 Cal. Rptr. at 211, citing *Toussaint*, 292 N.W.2d at 896.

Thus, according to Alaska law, the jury is entitled to review the employer's termination decision; Instruction 7, given by the district court and affirmed by the Ninth Circuit, properly includes an objective standard. (App. A.) Further, both the district court and the Ninth Circuit correctly predicted that the Alaska Supreme Court would follow *Toussaint*, and the Alaska Supreme Court did just that in *Jones* and *Zoerb*, *supra*. Clearly, petitioner's first and second arguments, which rely upon there being a conflict between the district court's and the Ninth Circuit's analysis of the law, have no merit.[6]

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[6] The cases cited by the petitioner in support of its first and second reasons for the writ are not applicable here since the district court and the Ninth Circuit were in complete agreement: *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), is clearly distinguishable. (Petition for Writ at 9-11.) In *Boyle*, it was not clear if the appellate court was assessing on its own whether a defense had been established. 487 U.S. at 514. Here, both the trial court and the Ninth Circuit agreed the petitioner was required to show just cause. *Singleton v. Wolff*, 428 U.S. 106 (1976), has nothing to do with the *Sanders* appeal issues. In *Singleton*, the Supreme Court held that the court of appeals erred in proceeding beyond the issue of standing to a resolution on the merits, since the petitioner had filed no answer and no other pleading except the motion to dismiss for standing. 428 U.S. at 119-120. Here, petitioner presented all its evidence and its legal arguments in its motion for summary judgment, defendant's proposed jury instructions, objections to jury instructions, and post trial motions.

3. The Question Of The Ninth Circuit's Deference To The District Court's Evaluation Of Alaska Law Was Never Raised On Appeal; Even If It Were, This Court Approved The Ninth Circuit's *de novo* Standard Of Review In *Salve Regina College v. Russell.*

Finally, petitioner tries to inject into this case the question of whether the Ninth Circuit failed to defer to the Alaska district court's evaluation of Alaska law. However, not only was this question not raised in the court of appeals,[7] but this Court recently decided, in *Salve Regina College v. Russell*, 59 U.S.L.W. 4219 (March 20, 1991), that the Ninth Circuit's approach of refusing to defer to a district court's legal analysis is correct. Accordingly, certiorari should not be granted on this ground either.

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[7] In the court of appeals, it was petitioner that attacked the district court's analysis of Alaska law, and respondents who defended it. Accordingly, petitioner not only did not object to the possibility that the Ninth Circuit might give insufficient deference to the district judge's analysis of the law of the forum state, but petitioner itself argued for reversal of that analysis based on a *de novo* standard. In any event, the district and appellate courts were in complete agreement as to Alaska law; this was confirmed in *Jones* and *Zoerb, supra.*

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

LEE HOLEN
LAW OFFICES OF LEE HOLEN
437 E Street, Suite 400
Anchorage, Alaska 99501
(907) 278-0298
Attorney for Respondents

Dated: April 16, 1991

APPENDIX A

INSTRUCTION NO. 7

You are instructed that the burden of proof is on the plaintiffs Bowen Sanders, Rhodney Cantu, and George Howard to prove by a preponderance of the evidence that during the period of their employment, the contract of employment with Parker Drilling included an implied promise or agreement that Parker Drilling would terminate plaintiffs only for just cause. If the plaintiffs fail to prove by a preponderance of the evidence that their employment contracts contained an implied covenant to terminate only for just cause, then the plaintiffs' contracts were terminable at will, and you must find for Parker Drilling and against the plaintiffs on this issue.

However, if you find that the plaintiffs have proved by a preponderance of the evidence that the contract included an implied promise or agreement that Parker Drilling would terminate plaintiffs only for just cause you must then consider whether Parker Drilling has proved by a preponderance of the evidence that it had just cause to terminate the plaintiffs for violating Parker's rules or policy prohibiting use of drugs at its camps or on its drilling rigs. You are instructed that just cause is generally a fair and honest cause or reason, regulated by good faith on the part of the employer in light of all the facts and circumstances. If you find that the plaintiffs have proved that the contract included an implied covenant to terminate only for just cause and Parker Drilling has failed to prove that it had just cause to terminate the plaintiffs, you must then find for plaintiffs on this issue.

But if you find that the contract included an implied covenant to terminate only for just cause and Parker Drilling proved that it had just cause to terminate the plaintiffs for violation of its rules or policies against drug use at its camps or on its drilling rigs, then you must find for Parker Drilling on this issue.